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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

CAESARS ENTERTAINMENT )  
OPERATING COMPANY, INC., )  
CAESARS ENTERTAINMENT )  
CORP., and CAESARS )  
ENTERPRISE SERVICES LLC, )  
Plaintiffs, )  
v. )  
EMARKER, LLC, )  
Defendant. )

Case No. 2:15-cv-02214-JAD-VCF  
  
**DEFENDANT /  
COUNTERCLAIM  
PLAINTIFF'S RESPONSE IN  
OPPOSITION TO PLAINTIFFS'  
/ COUNTERCLAIM  
DEFENDANTS' MOTION FOR  
PROTECTIVE ORDER**

**I. INTRODUCTION**

Caesars' Motion for Protective Order asks this Court to require a hyper-technical "identification" of trade secrets before discovery can commence. This Court should deny the motion.

1 In short, this Court does not require such an "identification"  
 2 threshold. Even if it did, eMarker, LLC ("eMarker") has already adequately  
 3 identified the alleged trade secrets at issue. Indeed, Caesars possesses  
 4 eMarker's three documents at issue and has already shared the information  
 5 in those documents with non-parties. In addition, eMarker has requested  
 6 in discovery specific *Caesars's* documents that eMarker believes should  
 7 reveal Caesars's misappropriation, but Caesars refuses to produce those  
 8 documents. Thus, the notion that Caesars has not been "put on notice" of  
 9 the claims against it or cannot determine what is "relevant" for discovery is  
 10 not accurate.

11 Further, even assuming, *arguendo*, that none of eMarker's  
 12 information compromises trade secrets—which is not the case—eMarker  
 13 would still be entitled to discovery related to its other causes of action,  
 14 including, for instance, breach of contract. Caesars, however, has neither  
 15 produced a single document in discovery nor provided a meaningful  
 16 response to any of eMarker's requests and states that it will not do so  
 17 unless eMarker complies with Caesars's "identification" threshold.

18 In the end, Caesars—the *Plaintiffs* in this case—has moved this  
 19 Court for a radical reimagining of discovery with no legitimate basis to do  
 20 so. For these many reasons, its Motion should be denied.

## 21 II. FACTS

### 22 A. The parties are well aware of the information at issue.

23 eMarker has alleged as follows:

24 17. Relying on Counter-Defendants' assurances regarding the  
 25 confidential treatment of the documents and information  
 26 exchanged, eMarker continued to provide information and  
 27 documentation to Caesars' executives for consideration and  
 28 evaluation of the eMarker system throughout this sales process.  
 Among the many confidential documents provided both  
 electronically and in hard copy were, for example, (a) versions

1 of the client and server requirements sheets for the "eMarker  
2 Central Technical Guide" (hereinafter "CTG"); (b) versions of  
3 the "eMarker Central Operator Guide" (hereinafter "COG"); and  
4 (c) versions of the "eMarker Mobile Operator Guide"  
5 (hereinafter "MOG").

6 18. Each page of the CTG, COG, and MOG also contained the  
7 following restrictive language:

8 The information in this Guide constitutes the proprietary,  
9 confidential trade secrets of eMarker, LLC, and its use and  
10 disclosure are strictly limited to those employees of the  
11 casino having a need to access the Guide and who are  
12 bound to maintain the trade secret status of the Guide.

13 (Doc. 9, Countercl., ¶¶ 17-18). eMarker has likewise identified these same  
14 documents—the CTG, COG, and MOG—in its discovery responses. (*See*  
15 Doc. 28, Declaration of Todd Gregorian ("Gregorian Decl.") at Ex. 4,  
16 Interrog. No. 1). Caesars has also explicitly acknowledged that these same  
17 three documents are at issue. (Doc. 28, Memo. Supp. Mot. Prot. Order, p. 4  
18 n.3).

19 **B. eMarker has identified the alleged wrongdoing at issue.**

20 eMarker has also alleged:

21 25. In a jurisdictional deposition in the Tennessee action, Mr.  
22 Behrman testified that at some point after eMarker provided  
23 Counter-Defendants with its confidential trade secret  
24 information Counter-Defendants asked three outside vendors  
25 to offer an alternative to a paper-marker system, i.e. an  
26 electronic marker system.

27 26. Mr. Behrman further testified that he gave two of these  
28 three vendors a "manual" or "document" that Counter-  
Defendants had compiled.

29 27. Mr. Behrman further testified that Counter-Defendants  
have also assembled an internal team comprised of a "large  
number" of individuals with different properties under the  
Caesars' umbrella who have also been supplied with this  
"manual" or "document."

1 28. Counter-Defendants have refused to provide a copy of  
 2 this "manual" or "document" to eMarker. Upon information  
 3 and belief, Counter-Defendants used eMarker's confidential  
 4 trade-secret information to develop this "manual" or  
 5 "document." Counter-Defendants would not have had the  
 6 capacity to develop, or have a third-party develop, this  
 7 "manual" or "document" or an electronic marker system  
 8 without misappropriating eMarker's confidential documents  
 9 and information.

10 29. When asked whether Caesars has used eMarker's  
 11 proprietary information in its efforts to develop an alternative  
 12 to a paper marker system, Mr. Behrman stated that he could not  
 13 recall:

14 Q. What information have you provided to Global  
 15 Payment Services [one of the third-party vendors with  
 16 whom Caesars has engaged] in connection with your  
 17 exploratory work with them regarding another approach  
 18 to marker issuance?

19 A. Some of our business requirements of what we would  
 20 like to see in a product.

21 Q. Have you provided any of the materials that Thompson  
 22 Patterson and eMarker provided to Caesars?

23 A. Not that I recall.

24 ...

25 **(Breach of Contract and Breach of the Duty of Good Faith and**  
 26 **Fair Dealing (under New Jersey law))**

27 33. As noted above, the NDA required Counter-Defendants  
 28 to, among other things, keep confidential the information  
 provided in connection with the contemplated transaction and  
 only provide such information to those individuals for  
 purposes of pursuing a business deal with eMarker.

34. The NDA also required Plaintiffs to return such  
 information when the discussions between the parties ended.

35. The NDA also specifically recognized that information  
 eMarker provided to Counter-Defendants was proprietary to  
 eMarker and Counter-Defendants would not use such  
 information.

...

37. Upon information and belief, Counter-Defendants have violated the NDA by, among other things, not abiding by the confidentiality provisions prior to February 2014, by not returning the information in either February 2014 or earlier, as required by the NDA, and by using this information to, among other things, create a document or manual to distribute to Caesars' employees and third-party competitors of eMarker to assist Counter-Defendants and third-party vendors in developing an electronic marker system identical to eMarker's system that would compete with eMarker's system.

(See Counterclaim, ¶¶ 25-29, 33-35, 37).

eMarker has specifically requested Caesars's "document" or "manual" in discovery. (Declaration of Tim L. Warnock ("Warnock Decl."), at Exhibit A at Req. Prod. No. 4). Thus, in its discovery requests, eMarker has used Caesars's own description of the written material that Caesars admits disseminating. (*Id.*). As such, the parties know precisely the documents at issue.

### III. ARGUMENT

#### A. This Court does not require Caesars's hyper-technical "identification" of trade secrets before discovery can begin.

This Court has rejected similar requests to impose a threshold requirement that a party identify trade secrets with hyper-technical specificity before discovery is permitted. Indeed, in *Glob. Advanced Metals USA, Inc. v. Kemet Blue Powder Corp.*, No. 3:11-CV-00793-RCJ, 2012 WL 3884939, at \*7 (D. Nev. Sept. 6, 2012), this Court upheld the Magistrate Judge's ruling denying a request that plaintiff's trade secrets be "identified" prior to discovery. The Court favorably cited the Magistrate Judge's holding "that a listing of every trade secret would draw an objection from Defendant that they must be narrowed, leading to additional discovery disputes and delays, and that a protective order against disclosure would protect Defendant's interests." *Id.*

1           Such, of course, appears to be exactly Caesars's plan in this  
2 case: as noted above, although Caesars is well aware of the three  
3 documents at issue, Caesars has asked eMarker to highlight words within  
4 these documents that it believes to be trade secret. (*See* Warnock Decl., ¶  
5 3). eMarker presumes that, even if it did so, Caesars would continue to  
6 claim a lack of understanding of the issues in the case and would demand  
7 further specification, while continuing to refuse to produce the Caesars  
8 "document" or "manual" that was specifically identified as a pertinent  
9 document in this dispute as far back as September 2015.

10           Otherwise, in its Motion, Caesars expends little effort  
11 attempting to distinguish cases that hold that identification is not  
12 necessary. Instead, Caesars simply states that those cases involve  
13 situations in which a "defendant secretly took files and plaintiff does not  
14 know what is missing." (Doc. 28, Memo. Supp. Mot. Prot. Order, p. 10).

15           That description is inaccurate. *Nike, Inc. v. Enter Play Sports,*  
16 *Inc.*, 305 F.R.D. 642, 646 (D. Or. 2015)—referenced by eMarker in the  
17 Discovery Plan and Scheduling Order, (*see* Doc. 27, ¶ 3)—involves facts  
18 very similar to those at issue here: plaintiff entered into an NDA with  
19 defendant for purposes of engaging in a business partnership. The  
20 defendant then allegedly took proprietary information and attempted to  
21 patent a product built using that confidential information. The court noted  
22 that plaintiff's identification of its trade secrets was "sufficient...to permit  
23 discovery to proceed:"

24           The Court notes that [defendant] answered the Complaint.  
25 [Defendant] did not move under the Federal Rules of Civil  
26 Procedure to dismiss the Complaint for failure to state a claim  
27 under Rule 12(b)(6) and did not move, or alternatively move,  
28 for a more definite statement under Rule 12(e). Further,  
[defendant] asserted in its first counterclaim that [plaintiff]'s  
alleged trade secrets either were not disclosed in [defendant]'s



1 patent Applications or, to the extent they were, then they were  
2 not subject to the protections of the NDA based on the NDA's  
3 express exclusions. [Plaintiff]'s claimed trade secrets must have  
4 been sufficiently clear to [defendant] to permit [defendant] to  
5 make these assertions.

6 *Id.*

7 Likewise, here, Caesars did not move to dismiss a number of  
8 eMarker's claims, including the claim for violation of certain trade secret  
9 statutes. (*See* Doc. 22). Caesars also did not move for a more definite  
10 statement of eMarker's Counterclaim related to eMarker's trade secrets.  
11 And, indeed, Caesars specifically referenced the documents containing the  
12 trade secrets at issue in its Motion for Protective Order. (Doc. 28, p. 4 n.3).  
13 Thus, Caesars appears well aware of the information at stake.

14 Finally, the Court in *St. Jude Med. S.C., Inc. v. Janssen-Counotte*,  
15 305 F.R.D. 630, 641 (D. Or.), *reconsideration denied*, 104 F. Supp. 3d 1150 (D.  
16 Or. 2015) detailed the policy considerations behind refraining from  
17 requiring identification of trade secrets prior to discovery. The Court noted  
18 that a party "has a broad right to discovery," and reasoned that requiring a  
19 party to "identify its trade secrets without first knowing which have been  
20 misappropriated" would place the party "in somewhat of a 'Catch-22.' " *Id.*  
21 (internal quotations and citations omitted).

22 Here, as an initial matter, if Caesars simply produced the  
23 Caesars "document" or "manual" specified in the Counterclaim, eMarker  
24 could very easily identify what trade secret information from within the  
25 CTG, COG, and MOG Caesars has misappropriated in its creation of this  
26 "document" or "manual."

27 Further, the cases cited by Caesars, which purportedly support  
28 a threshold "identification" of trade secrets, do not address situations such  
as the one here in which eMarker has specifically identified three  
documents which contain the trade secret information at issue. In the cases

1 Caesars cites in support, the references to the trade secrets at issue were far  
2 more "general" or "generic;" for instance, a plaintiff stated that a defendant  
3 had "knowledge of technology and designs." *Switch Commc'ns Grp. v.*  
4 *Ballard*, No. 2:11-CV-00285-KJD, 2012 WL 2342929, at \*2 (D. Nev. June 19,  
5 2012); *see also Vesta Corp. v. Amdocs Mgmt. Ltd.*, No. 3:14-CV-1142-HZ, 2015  
6 WL 7720497, at \*8 (D. Or. Nov. 30, 2015) (describing trade secret  
7 descriptions as "broadly stated," "lack[ing] particularity," "too general and  
8 generic" and only revealing "end results" of the trade secrets themselves);  
9 *Porous Media Corp. v. Midland Brake Inc.*, 187 F.R.D. 598, 600 (D. Minn. 1999)  
10 (generalized statement referencing, among other things, "[m]anufacturing  
11 process information"). Or, else, the plaintiffs' attempts at identification of  
12 trade secrets made reference to "thirty-two other documents, documents  
13 which plaintiffs have not disclosed." *BioD, LLC v. Amnio Tech., LLC*, No.  
14 2:13-CV-1670-HRH, 2014 WL 3864658, at \*3 (D. Ariz. Aug. 6, 2014).

15 If eMarker's only identification of its trade secrets consisted of,  
16 for example, "knowledge of an electronic marker system" or if eMarker had  
17 vaguely referred to other documents that had not been disclosed, then  
18 these cases might arguably be applicable. But, instead, here, eMarker has  
19 been sufficiently specific to put Caesars "on notice."

20 Finally, regardless of the Court's determination of this issue,  
21 Caesars should have already provided legitimate responses in discovery, as  
22 eMarker has a number of other claims in this lawsuit other than a claim for  
23 violation of various trade secrets statutes. Caesars, however, has refused to  
24 provide any substantive responses or even a single document in discovery  
25 related to those claims. (*See Warnock Decl. at Ex. A*).

26 For instance, eMarker's claim for breach of contract does not  
27 involve the identification of trade secrets and explicitly alleges that the  
28 creation of Caesars's "document" or "manual" was a breach of contract. (*See*



Doc. 9, Countercl., ¶¶ 25-29, 37). As a case cited by Caesars explicitly provides, (*see* Doc. 28, Memo. Supp. Mot. Prot. Order, p. 7), in situations such as this one when one party moves for "identification" of trade secrets, "only that portion [of discovery] which implicates their trade secrets [should be suspended]. Discovery should proceed unhindered on the other counts." *AutoMed Techs., Inc. v. Eller*, 160 F. Supp. 2d 915, 926 (N.D. Ill. 2001). eMarker is entitled to immediate discovery responses from Caesars related to its other causes of action, which would include, at the very least, the "document" or "manual" Caesars created using eMarker's information.

**B. Caesars's policy arguments related to the necessity of trade secret "identification" fail.**

Caesars does not attempt to provide valid support for its arguments that (a) eMarker has only provided "generalized allegations of wrongdoing"; or (b) eMarker might "mold" its trade secrets to whatever information eMarker receives in discovery, because, frankly, Caesars apparently does not believe these arguments itself. (*See* Doc. 28, pp. 8-10).

First, eMarker's allegations are exactly the opposite of "generalized allegations of wrongdoing." As noted above, eMarker has alleged not only the specific act of misappropriation but also an actual document that Caesars created that eMarker believes reflects that misappropriation. (*See* Counterclaim, ¶¶ 25-29). Thus, Caesars is on notice and can respond to eMarker's discovery requests.

Further, Caesars failed to offer even a suggestion as to how eMarker could "mold" its trade secrets to what eMarker found in discovery when eMarker has already specifically identified three documents that eMarker claims contain its trade secret information.

1 Finally, Caesars argues that eMarker's "blanket" reference to its  
 2 three guides is not enough to identify the trade secrets at issue to put  
 3 Caesars on notice of eMarker's claim. Such an argument, again, is  
 4 unavailing. As noted above, Caesars is well aware of the wrongdoing at  
 5 issue and eMarker's allegations. Indeed, the only case Caesars cites in its  
 6 Motion that involves "guides" or "manuals" is *IDX Sys. Corp. v. Epic Sys.*  
 7 *Corp.*, 285 F.3d 581, 583-84 (7th Cir. 2002), which was a ruling *on a motion for*  
 8 *summary judgment* and, thus, is not applicable whatsoever to this Motion  
 9 for a Protective Order.

10 In the end, even if "identification" were necessary, eMarker has  
 11 sufficiently identified the trade secrets at issue to put Caesars on notice of  
 12 the claims against it. As this Court is well aware, a trade secret is defined  
 13 as

14 [I]nformation, including, without limitation, a formula, pattern,  
 15 *compilation*, program, device, method, technique, product,  
 16 system, process, design, prototype, procedure, computer  
 17 programming instruction or code that:

18 (a) Derives independent economic value, actual or  
 19 potential, from not being generally known to, and not being  
 20 readily ascertainable by proper means by the public or any  
 21 other persons who can obtain commercial or economic value  
 22 from its disclosure or use; and

23 (b) Is the subject of efforts that are reasonable under the  
 24 circumstances to maintain its secrecy.

25 NRS 600A.030 (emphasis added).<sup>1</sup>

26 The trade secrets at issue in this case are compilations of  
 27 information found in the CTG, COG, and MOG that were provided to  
 28 Caesars by eMarker in connection with an agreement that Caesars would  
 keep the documents and information confidential and only use the

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<sup>1</sup> The Tennessee and New Jersey trade secret statutes are similar. *See* Tenn.  
 Code Ann. § 47-25-1701, et. seq.; N.J. Stat. Ann. § 56:15-2 et seq.

documents and information in connection with pursuing a business deal between Caesars and eMarker. (*See* Doc. 9, ¶¶ 11-17).

**IV. CONCLUSION**

For the reasons detailed above, Caesars' Motion should be denied.

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**CERTIFICATE OF SERVICE**

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of MORRIS LAW GROUP, and that the following document was served via electronic service: **DEFENDANT / COUNTERCLAIM PLAINTIFF'S RESPONSE IN OPPOSITION TO PLAINTIFFS' / COUNTERCLAIM DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

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I further certify that I am familiar with the firm's practice of collection and processing documents for mailing; that in accordance therewith, I caused the above-named document to be deposited with the U.S. Postal Service at Las Vegas, Nevada, in a sealed envelope, with first class postage prepaid, on the date and to the addressee(s) shown below:

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DATED this 18th day of April, 2016.

By           /s/Fiona Ingalls